Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

No. 09-602

IN THE
Supreme Court of the United States

DAVID BOYD,

Petitioner,

v.

GUIDANT SALES CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

KIRSTEN M. CASTAÑEDA
Counsel of Record
EDWARD L. FRIEDMAN
KELLY J. THURMAN
LOCKE LORD BISSELL & LIDDELL L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000

Attorneys for Respondent

227624

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), this Court clarified the proper standard for establishing a violation of the Age Discrimination in Employment Act (ADEA). A showing that age was a motivating factor in the termination decision is *not* sufficient to establish discrimination. 129 S.Ct. at 2349, 2350. Instead, age must rise to the level of the "but-for" cause of the employer's adverse decision. *Id.* at 2350.

At the trial of David Boyd's ADEA claim, the jury answered three questions. The first two questions asked whether Boyd's age was a motivating factor in Guidant's decision to terminate Boyd's employment, and whether Guidant's discrimination was willful. The third question asked:

> Do you find from a preponderance of the evidence that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?

The jury answered all three questions "Yes." By answering the third question "Yes," the jury essentially found that age did not rise to the level of the "but-for" cause of Boyd's termination.

Did the trial court err by entering judgment that Boyd take nothing on his ADEA claim?

CORPORATE DISCLOSURE STATEMENT

Respondent Guidant Sales Corporation is a wholly owned subsidiary of Boston Scientific Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Boyd Generated Repeated Complaints From Customers and Co-Workers During His Employment With Guidant	3
B. Boyd's Alienation of and Retaliation Against a Guidant Customer Resulted in His Termination	6
C. During the Same Time Frame, Two Younger Employees Were Terminated for Treating Customers Rudely	9
D. The Jury Found that Guidant Would Have Terminated Boyd's Employment Regardless of Age	11
E. The District Court Denied Boyd's Request for Attorneys' Fees	13

Contents

	Page
REASONS FOR DENYING THE PETITION ...	13
A. The Fifth Circuit Properly Analyzed Whether the Pre-*Gross* Judgment Comports with the Standards Clarified in *Gross*	14
B. The "Willful" Finding Does Not Amount to "But For"Causation	19
1. The Fifth Circuit's opinion does not conflict with *Gross*, *Hazen Paper*, or *Reeves*	21
2. The ADEA does not authorize Boyd's recovery of attorneys' fees	22
C. This Case Does Not Involve "Pretext" Discrimination	23
CONCLUSION	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343 (2009) ..... *passim*

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) ..15, 17, 18, 22, 23

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) .. 15, 23, 24, 25

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 18, 21, 22, 23, 24, 25

Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968) 21

Rountree v. Smith, 108 U.S. 269, 2 S.Ct. 630, 27 L.Ed. 722 (1883) 21

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 25

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) 19

Cited Authorities

Page

Statutes:

29 U.S.C. § 216(b) 23

29 U.S.C. § 623(a)(1) 25

29 U.S.C. § 626(b) 23

42 U.S.C. § 2000e, *et seq.* 14

Rules:

SUP. CT. R. 10 2

SUP. CT. R. 10(a) 3

SUP. CT. R. 10(c) 2

Other Authority:

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS 265 (5th ed. 1984) 1

INTRODUCTION

Contrary to the theme of Boyd's brief, both the trial court's judgment and the Fifth Circuit's opinion are in accord with the law as set forth by this Court. Accordingly, this case does not involve any of the grounds set forth in Supreme Court Rule 10 or any other compelling reason to justify discretionary review.

As this Court announced less than one year ago, "To establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 129 S.Ct. at 2350. Boyd failed to meet this standard.

The jury specifically found "that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age . . . ." (5CR:1144, reproduced in the *Petition Appendix* at 23.) This jury question was given before *Gross* issued; it did not use the words "but for." Nevertheless, as this Court has noted, an act or omission is not regarded as a cause of an event if the particular event would have occurred without it. *Gross*, 129 S.Ct. at 2350 (citing and quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS 265 (5th ed. 1984)). Thus, the jury's answer amounts to a finding that Boyd's age was *not* the "but-for" cause of Guidant's decision. *See id.*

Pursuant to the jury's finding, the trial court entered a take-nothing judgment against Boyd. (5CR:1155.) In affirming the judgment, the Fifth Circuit

did not create a heightened causation requirement or employ new standards of review. Instead, in a concise, well-reasoned, unpublished opinion, the Fifth Circuit concluded that "Boyd has had his chance to convince a jury that he would not have been terminated but for his age . . . ." *Boyd v. Guidant Sales Corp.*, 2009 WL 2573407, at *1 (5th Cir. Aug. 21, 2009). The Fifth Circuit noted that, even without the benefit of *Gross*, the trial court reached the correct judgment. *See id.* With regard to Boyd's subordinate evidentiary issue and attorneys' fees challenge below, the Fifth Circuit stated simply that "[t]he district court also did not abuse its discretion in its evidentiary rulings and did not err as a matter of law in regard to the remaining issues on appeal." 2009 WL 2573407, at *1.

Neither the trial court's judgment nor the Fifth Circuit's opinion provides a basis for review under Supreme Court Rule 10. The Fifth Circuit's opinion does not conflict with opinions from this Court, another U.S. court of appeals, or a state court of last resort. *See* SUP. CT. R. 10(a),(c). Furthermore, this case does not involve an important, unsettled question of federal law. *Id.* at 10(c). This Court has settled the question of the standard required to prove a disparate-treatment claim under the ADEA. *See Gross*, 129 S.Ct. at 2350. The Fifth Circuit recognized *Gross* as setting forth the applicable standard and applied that standard to affirm the trial court's judgment. *Boyd*, 2009 WL 2573407, at *1. Because there is no compelling reason for review, the Petition for Writ of Certiorari should be denied. *See* SUP. CT. R. 10.

STATEMENT OF THE CASE

Guidant hired Boyd in 1999, when he already was 55 years old. (3RR:110.) During Boyd's five years of employment with Guidant, his performance appraisals and evaluations consistently reflected that he engaged in rude and insensitive behavior and that clients and co-workers lodged numerous complaints with Guidant. Boyd admits that Guidant received complaints from its employees and customers regarding his personality and attitude. (2RR:144; *Petition* at 5.) This Statement provides a sample of the evidence presented to the jury, demonstrating that – regardless of Boyd's age or the excuses he offered for his rude and insensitive behavior toward customers and patients – his persistent performance problems and continued customer complaints warranted the termination of his employment.

A. Boyd Generated Repeated Complaints From Customers and Co-Workers During His Employment With Guidant

Boyd's job at Guidant required him to interact constantly with clients and to be responsive under potentially life-threatening conditions. (*See* 2RR:151-69.) His work involved pacemakers (which maintain a steady heart rhythm) and defibrillators (which control life-threateningly fast heart rates, and also may incorporate a pacemaker). (*See* 2RR:151.) His job responsibilities included working with doctors during the implant operation, performing follow-up testing on patients, providing training to doctors' staff, and answering questions from doctors' staff. (2RR:152-53, 155-57, 159.)

Throughout most of his employment with Guidant, Boyd's supervisor was Bill Boulter. (3RR:11, 16; D.Ex. 10.) Boulter was a few years older than Boyd. (3RR:11.) Boulter's own supervisor, Kevin McVeigh, was about the same age as Boulter. (*Id.*)

Over the first year and a half of Boyd's employment, Boulter noticed that, although Boyd was technically competent, he tended to treat nurses and staff not as well as he treated the physicians who were customers. (5RR:70.) In the form appraising Boyd's 2001 job performance, Boulter noted that he had received "multiple reports . . . wherein Dave [Boyd] has created considerable ill will among some customers as a result of reported rude and insensitive behavior toward customers and patients." (D.Ex. 10 at Boyd 310; 3RR:34-35.) Nurses and staff, as well as Boyd's co-workers, had reported to Boulter that Boyd was very gruff and unkind, and spoke down to some of the nurses and patients. (*Id.* at 70, 72-73.) The client ill will reached the point that Boyd was not permitted to cover certain doctors' practices. (*Id.* at 71-73.)

Overall, Boulter rated Boyd's 2001 performance as "Needs Improvement." (D.Ex. 10 at Boyd 310.) Boulter summarized that Boyd "recognizes the need to always present a pleasant and professional image and is committed to eliminating negative feedback from any customers and patients." (*Id.*)

Although Boyd made some positive strides "during the later half of 2002," there were continued and frequent complaints from customers and co-workers about Boyd's abrupt and insensitive treatment.

(4RR:168-73; 5RR:70-73, 86-100; D.Ex. 11-12.) Therefore, in his 2002 performance review, Boulter rated Boyd's overall performance as "Improvement Required." (D.Ex. 15 at Boyd 333.) A year later, Boulter still rated Boyd's overall performance as "Improvement Required." (D.Ex. 22 at GSC-B 00097; *see also* 5RR:112-15.)

In March 2004, Boyd was given a warning and "final" opportunity to resolve his continuing issues. (4RR:156, 158; D.Ex. 23.) The "30-Day Evaluation and Final Warning" was presented to Boyd jointly by Boulter (who was moving to a different territory) and Cary Paulette (the incoming supervisor). (3RR:62-63, 65, 84, 234; 5RR:62, 116; D.Ex. 23.) Paulette was in his mid-forties. (3RR:62, 64.) Paulette's own supervisor became Roger Owens, who was in his early thirties. (*Id.*) However, Owens was not involved in the decision to give the final warning. (3RR:225; 4RR:183, 239-40; 5RR:122.)

The list of objectives attached to the final warning included the following: "Treat all physicians, patients, nurses, techs, administrative personnel, fellow reps and FCRs with whom you come in contact pleasantly, with respect and courtesy. Receive no customer complaints. Management reserves the right to review the validity of the complaint. Feedback will actively be solicited from customers and Guidant personnel." (D.Ex. 23 at GSC-B 00138-39.)

At the end of the 30-day period, Boyd was informed that he successfully completed the assessment described in the final warning. (PEx. 41; 3RR:81, 174-76; 4RR:185.) However, in a memo dated June 16, 2004, Guidant made

clear that "it is expected that you will continue to meet or exceed the level of performance required in your position on a sustained basis." (PEx. 41.) Guidant also expressly informed Boyd that "failure to meet the minimum acceptable performance standards for your position will result in immediate termination." (*Id.*)

B. Boyd's Alienation of and Retaliation Against a Guidant Customer Resulted in His Termination

Approximately one month later, Boyd received a call at approximately 2:00 p.m. on a Friday from a nurse at a pacemaker telephone follow-up clinic. (3RR:89.) This type of follow-up involves checking the status of the device's battery. The devices last approximately seven to ten years, and then must be changed out. (2RR:154-55.) As the device battery decays, the "magnet rate" falls. (2RR:159.) For example, the "magnet rate" of the Guidant device starts at 100 and decreases to 85, which is the point at which the device needs to be replaced. (*Id.*) To check the battery status via a telephone follow-up clinic, the patient calls into the clinic and transmits ECGs – one with and one without a magnet placed on the device – over the telephone lines to the clinic for his/her device to be checked. (*Id.* at 158; 3RR:89.)

On this particular occasion, the clinic nurse, Katie Chapman, called Boyd with a problem. (3RR:89, 91, 99.) She told Boyd that the magnet rate of the patient's device had *increased* from 85 at the last follow-up to a current rate of 100. (*Id.*)

Boyd knew that Chapman had not been on the job very long and was calling him for his help in properly

reading the device. (*See* 3RR:89, 92). She was having problems understanding a magnet rating on a device whose previous measurement had been at an end-of-service rate. (3RR:89) Boyd recognized that, if a nurse does not get a proper reading on a device that is, in fact, at the end of service, the risks to the patient could be "catastrophic." (2RR:165-66.) Indeed, he conceded at trial that the situation identified by Chapman could have presented a "premature battery depletion issue." (4RR:119.)

Yet, Boyd pushed aside Chapman's concerns. He told Chapman that he was on his way to an implant, that he would not be done with the implant until her clinic closed, and that it would be Monday before he could get back with her to confirm that there was no problem with the device. (*Id.* at 91-92.) If the patient developed a problem, Boyd advised Chapman to have the patient "thrown into an ambulance and brought to the clinic." (D.Ex. 26; 3RR:252-53; *see* 4RR:123.)

Boyd departed for his implant procedure thinking he had successfully allayed the problem until Monday. (*See* 3RR:92-93.) However, Chapman remained concerned about the anomalous device reading and telephoned a Guidant tech services employee, Jeremy Lind. (3RR:243, 245-46; D.Ex. 25; see also 3RR:93.) She recounted the reading issue and said that her Guidant representative had refused to check the patient. (3RR:246.) Although she was initially hesitant to give the representative's name, she ultimately identified Boyd. (*Id.*) Fearfully, Chapman asked Lind not to contact Boyd. (3RR:246-47.) Nevertheless, Lind responded that he needed to take care of the patient. (3RR:247.)

Thus, about thirty minutes after Boyd spoke with Chapman, he received a call from Lind. (3RR:92-93.) Lind informed Boyd that he had received a call about problems getting someone to check on a patient. (3RR:93, 247; D.Ex. 25.) Boyd responded angrily and repeatedly demanded to know who had called Lind. (3RR:247.) After Chapman was identified as the caller, Boyd told Lind that this was "bullsh*t". (3RR:93-94, 247-48; D.Ex. 25.) And, confirming Chapman's fears, Boyd also told Lind, "I'm going to call that b*tch back, and set her straight." (3RR:159-60, 247-48; D.Ex. 25.) Lind was so concerned about Boyd's attitude and threatening demeanor that he immediately e-mailed Owens and Paulette about the situation. (D.Ex. 25.) Lind also contacted Paulette by phone. (3RR:257-58.)

Before anyone could intervene, Boyd acted on his retaliatory threat against Chapman, a Guidant customer. (3RR:249, 251.) Boyd contacted Chapman's supervisor, Mona Bentzen, to complain. (3RR:95-96, 252-53.) He demanded to know "what was going on" (*id.* at 96), and complained to Bentzen about Chapman's contact with Guidant's technical staff (*id.* at 251, 253; D.Ex. 28). Although the problem between Boyd and Chapman might have begun as a misunderstanding, Boyd's decision to complain to the customer's supervisor created a major incident. (3RR:271.)

Upon learning of the problem on Friday afternoon from Lind, Boyd's supervisor, Paulette, understood the potential severity of the situation and responded immediately. (4RR:3.) Paulette began gathering information by calling Bentzen to find out what actually happened. (3RR:255-57; 4RR:3; *see also* 4RR:187-88,

244-45.) In doing so, Paulette learned of additional, previously unvoiced complaints about Boyd's ongoing behavior. (3RR:243-44, 257, 259-62, 264-70; 4RR:7-8, 12-16, 20-21; D.Ex. 28.)

On Monday, Paulette followed up with Boyd about Friday's events. (3RR:161-62.) From that conversation, Boyd believed that he would be fired. (*Id.* at 162.) Boyd refused to go to the regional office "just to be fired," so by memorandum dated August 2, 2004, Guidant formally informed Boyd that his employment was terminated effective August 3, 2004. (*Id.* at 164-65, 167; 4RR:255-56; P.Ex. 42.)

In the memorandum, Guidant stated that the termination was "due to your continuation of unprofessional behavior, discontent from both internal and external customers and your failure to maintain acceptable level of performance." (P.Ex. 42.) In Owens' words, "David Boyd fired himself." (4RR:231; *see also* 4RR:249-50.) Despite having been told on a number of different occasions to stop treating customers rudely or disrespectfully, Boyd continued to do so. (4RR:231.) Even Boyd admitted that he knew his own behavior and performance were "in part" the reason he was being fired. (3RR:112.)

C. During the Same Time Frame, Two Younger Employees Were Terminated for Treating Customers Rudely

During the same time frame as Boyd's termination, two younger employees were fired for rude treatment of customers. Approximately four months before Boyd

was terminated), Jennifer Henzel was terminated for "the manner in which [she is] perceived by our customers and co-workers, and [her] inability to demonstrate tech competency in covering cases, and in checking patients." (4RR:197; D.Ex. 45.) With regard to customer and co-worker perception, Guidant had "received feedback from both our customers and [Henzel's] peers . . . that [she is] perceived as being arrogant, abrupt, and rude in [her] interactions." (4RR:198; D.Ex. 45.)

As with Boyd: (1) Henzel was a field representative; (2) she reported to Owens; (3) she had been informed that she was required to treat all people with respect and courtesy; (4) she failed to do so; and (5) her employment was terminated. (4RR:196-99; D.Ex. 45). Unlike Boyd, Henzel was 33 at the time of her termination. (4RR:198.)

Similarly, Jeff Sears' employment as a sales representative was terminated approximately two months before Boyd's termination. (4RR:199-200; D.Ex. 46.) Like Boyd, Sears reported to Owens as his supervisor. (4RR:200.) The reasons provided in Sears' termination memo, which notes customer dissatisfaction with his conduct, are strikingly similar to Boyd's. (*Compare* D.Ex. 46 *with* P.Ex. 42.) Yet, unlike Boyd, Sears was 36 or 37 at the time of his termination. (4RR:201.)

D. The Jury Found that Guidant Would Have Terminated Boyd's Employment Regardless of Age

The trial on Boyd's ADEA claim was held in 2007, before this Court issued its opinion in *Gross*. The jury heard approximately four days of testimony and other evidence, including testimony from Boyd relating his version of the events. (*See* 2RR-5RR.) At the close of the case, the jury was faced with three questions as a predicate to any award of damages:

> (1) Do you find from a preponderance of the evidence that Plaintiff's age was a motivating factor in Defendant's decision to terminate Plaintiff's employment?
>
> (2) Do you find from a preponderance of the evidence that Defendant willfully violated the Age Discrimination in Employment Act by discriminating against Plaintiff on the basis of his age?
>
> (3) Do you find from a preponderance of the evidence that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?

Petition Apdx. at 22-23. In effect, the question of liability was presented in two parts: Question No. 1 (motivating factor) and Question No. 3 (at the time, framed as a mixed-motives defense). The district court overruled Guidant's objection that Question No. 2 – which asked

about the heightened intent required to impose liquidated damages – should follow, rather than precede, Question No. 3. (*See* 5RR:161.)

With regard to jury charge objections, Boyd contends in his Petition that he objected "to the submission of respondent's mixed-motive affirmative defense, i.e., Question #3." *Petition* at 9. Although it is true that Boyd lodged an objection to Question No. 3, that objection was narrowly limited, as follows:

> Your Honor, plaintiff objects to the inclusion of question number 3 on page 12 of the charge on the basis that the defendant has not submitted – has submitted no evidence, or in the alternative, insufficient evidence for a jury issue to be submitted on this point.
>
> That's the only objection I have.

(5RR:160.)

When presented with the charge, the jury answered Questions No. 1 through 3, "Yes." *Petition Apdx.* at 22-23. Thus, although the jury found in Boyd's favor that age was a motivating factor in the termination decision and that such age discrimination was willful, the jury answered the third question in favor of Guidant. (*Id.*) Because the jury found that Guidant would have made the same decision to terminate Boyd's employment even without considering his age, the trial court entered a take-nothing judgment against Boyd. (5CR:1155.)

E. The District Court Denied Boyd's Request for Attorneys' Fees

In a motion for new trial, Boyd requested attorneys' fees. (5CR:1166-68.) In addition to the fact that Boyd did not meet the ADEA standard for recovering fees, Boyd failed to document the hours spent and services provided by each lawyer and paralegal during over three years of work on the case. (*See* 5CR:1173-78.) Instead, Boyd submitted a summary affidavit that provided only a grand total of hours worked by each lawyer and paralegal who provided unspecified services on the case during a period of more than three years. (5CR:1176.) The summary also did not specify which of the hours worked were governed by which of the hourly rates charged by various personnel over the three-plus-year period. (*Id.*) The trial court denied Boyd's attorneys' fees request. (5CR:1186.)

REASONS FOR DENYING THE PETITION

In an effort to elevate the issues in this case above alleged "error correction," Boyd recasts the Fifth Circuit's analysis as a ground-breaking, standard-changing opinion. For example, in his two "reasons for granting the writ," Boyd argues that the Fifth Circuit "overturned" the jury's finding of willfulness. *Petition* at 12, 17. In fact, the willfulness finding was rendered immaterial by the jury's determination that Guidant would have made the same employment decision even without considering Boyd's age.

That ultimate jury finding prompted the district court's take-nothing judgment, and *Gross* later

confirmed that such finding was outcome determinative. In concluding that the district court's pre-*Gross* judgment comported with the standard announced in *Gross*, the Fifth Circuit took a straightforward approach at odds with Boyd's flamboyant characterizations. It is worth examining what the Fifth Circuit's determination actually involved before analyzing Boyd's version of the opinion.

A. The Fifth Circuit Properly Analyzed Whether the Pre-*Gross* Judgment Comports with the Standards Clarified in *Gross*

Boyd's claim against Guidant is a "mixed-motives" claim under the ADEA. (1CR:15-20.) In a "mixed-motives" claim, an employee alleges that he suffered an adverse employment act because of both permissible and impermissible considerations. *See Gross*, 129 S.Ct. at 2347. Prior to *Gross*, district courts generally applied to ADEA "mixed-motives" claims the same standards applicable to "mixed-motives" claims brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e, *et seq. Cf. Gross*, 129 S.Ct. at 2347-48.

In a Title VII "mixed-motives" claim, the question of liability involves a shifting burden of persuasion. *Gross*, 129 S.Ct. at 2347. If a Title VII plaintiff shows that discrimination was a "motivating" or substantial factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the impermissible

consideration. *Gross*, 129 S.Ct. at 2347; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

In *Gross*, this Court held that the burden of persuasion never shifts to the party defending against a "mixed-motives" ADEA claim. 129 S.Ct. at 2348. The Court examined the ADEA's language, which differs from that used in Title VII. *Id.* at 2349. In order to violate the ADEA, an employer must have taken adverse action "because of" age. *Id.* at 2350. The ordinary meaning of this requirement is that "age was the 'reason' that the employer decided to act." *Id.* Put another way, an ADEA claim cannot succeed unless age both "actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*." *Id.* at 2350 (setting forth quoted language in parenthetical with brackets and emphasis, quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (emphasis added)).

As indicated by the *Hazen Paper* language quoted above and in *Gross*, the Court did not change the components of the liability decision. A showing that age was a "motivating factor" is not sufficient to establish an ADEA violation, but it remains an intermediate consideration in deciding whether age was the "but-for" cause of the adverse decision. Ultimate liability still may be examined in two parts: (1) did age play *any* role in the decision-making process; and (2) if so, was age the *determinative* influence on the decision? *See Hazen Paper*, 507 U.S. 604, 610, 113 S.Ct. 1701; *cf. Gross*, 129 S.Ct. at 2350.

Rather than changing the underlying considerations, the Court clarified the placement of the burden of proof. With regard to the second prong, the employer is no longer required to prove that it would have taken the same action regardless of age; instead, the plaintiff bears the burden to prove that age was the "but-for" cause of the employer's decision. *Compare Gross*, 129 S.Ct. at 2347 *with id.* at 2350. This "but-for" question is case determinative. *Gross*, 129 S.Ct. at 2350 (stating that "[t]o establish a disparate-treatment claim under the plain language of the ADEA," a plaintiff "must prove that age was the 'but-for' cause of the employer's adverse decision).

Because the plaintiff now bears the burden of proof with regard to the entire liability question, juries in future trials may be presented with one overarching liability question. Nevertheless, the jury's intermediate thought process necessarily will involve the same two steps. For example, if a jury concludes that a plaintiff did not prove that age played any role in the decision-making process, the jury has no need to debate whether age rose to the level of the "but-for" cause.

In the case below, the liability question was presented in two components. Question No. 1 presented the "motivating factor" aspect and properly placed the burden of persuasion on Boyd. *Compare Gross*, 129 S.Ct. at 2348 *with* 5CR:1143. Question No. 3 presented the "determinative influence" issue as follows: "Do you find . . . that [Guidant] would have made the same decision to terminate [Boyd's] employment even in the absence of consideration of his age?" (5CR:1144.) If Guidant's decision would have occurred without considering age,

then age cannot be said to be the "but-for" cause. *See* PROSSER & KEETON ON LAW OF TORTS 265 (cited, with parenthetical, in *Gross*, 129 S.Ct. at 2350). Thus, Question No. 3 amounted to a "but-for" question, though it placed the burden of persuasion on Guidant.

Applying the holdings of *Gross* and *Hazen Paper* to the charge given to the jury: (1) Question No. 3 set forth the case determinative issue; but (2) the burden of persuasion should have been placed on Boyd, not Guidant. *See Gross*, 129 S.Ct. at 2348, 2350. The Fifth Circuit accurately observed that "[t]he jury's affirmative answer to the but-for interrogatory shown above [Question No. 3] dooms Boyd's chances of reversal or remand." *Boyd*, 2009 WL 2573407, at *1. Far from ignoring the jury's answers to Questions No. 1 and 2, the Fifth Circuit examined those questions and concluded that the answers did not satisfy the standard under *Gross* for a plaintiff to prevail on a "mixed-motives" ADEA claim. *See id.* It was not enough for Boyd to establish that age played a role in the employment decision, or that Guidant willfully considered age in its decision. *See Gross*, 129 S.Ct. at 2350. Boyd cannot succeed on his ADEA claim unless age rose to the level of the "but-for" cause of Guidant's adverse decision. *Id.* The jury's finding that Guidant's decision would have occurred even without consideration of Boyd's age dooms his claim and precludes reversal or remand. *See Gross*, 129 S.Ct. at 2350; *Boyd*, 2009 WL 2573407, at *1.

As the Fifth Circuit also correctly noted, "Boyd had his chance to convince a jury that he would not have been terminated but for his age . . . ." *Compare Boyd*, 2009 WL 2573407, at *1 *with* 5CR:1144. In the district

court, Boyd had no burden at all with regard to the "but-for" element, yet the jury still found against him. Viewed from the opposite angle, Guidant was subjected to a heightened burden – to negate the "but-for" element – but prevailed. Any error in shifting the burden of persuasion to Guidant was, therefore, harmless. Boyd is not entitled to a new trial to establish an element the jury already decided against him under a *lower* burden of persuasion.

Far from conflicting with *Gross*, *Hazen Paper*, or any other opinion of this Court, the Fifth Circuit's opinion recognizes that the district court's "judgment, albeit without benefit of *Gross*, is correct." *Boyd*, 2009 WL 2573407, at *1. In addition, it is worth noting that both the analysis performed by the Fifth Circuit and the result compelled in this case have limited impact on the law. The analysis and result are confined to a "mixed-motives" ADEA claim (1) submitted to a jury before *Gross* issued, (2) where the jury answered the "mixed-motives" defense question (*i.e.*, the "but-for" question with the burden incorrectly shifted to the employer) in favor of the employer.

In an attempt to sensationalize and expand the impact of the Fifth Circuit's opinion, Boyd characterizes it as: (1) imposing a heightened causation standard in conflict with *Gross*, *Hazen Paper*, and *Reeves*; and (2) overruling the "liability framework" set forth in *Reeves* and *Hazen Paper* for pretext discrimination claims. *Petition* at 11-12, 17. As shown in Sections B and C, below, the Fifth Circuit's opinion does not contain these holdings. *See Boyd*, 2009 WL 2573407, at *1. Nor does the opinion conflict with *Gross*, *Hazen Paper*, *Reeves*, or any other opinion of this Court.

B. The "Willful" Finding Does Not Amount to "But For"Causation

As his first reason for granting the writ, Boyd cites the Fifth Circuit's "holding that *Gross's* newly stated 'but for' causation standard requires causation beyond 'willful.'" *Petition* at 12. No such holding appears in the Fifth Circuit's opinion. *See Boyd*, 2009 WL 2573407, at *1. Moreover, "willfulness" presents an issue of intent, not of causation. *Cf. Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (discussing meaning of willfulness under the ADEA).

In order to recast "willful" as a matter of causation, Boyd focuses on an introductory sentence in the court's charge. *See Petition* at 13. The district court organized the charge into three parts: (1) a host of instructions; (2) a list of jury questions; and (3) a group of "post-argument" instructions. *Petition Apdx.* at 9-22 (instructions), 22-24 (questions). Contained in the midst of the first set of instructions was the following sentence, "If you find [Guidant] terminated [Boyd] because of his age, then you must also determine whether [Guidant's] action was 'willful.'" (5CR:1143.) Boyd argues that use of the phrase "because of" in the instructions means that the jury's "yes" answer to the question of willful intent (Question No. 2) equates to a finding of "but for" causation. *Petition* at 13-15.

There are several critical flaws in this argument. Despite the instructions, Question No. 2 on willful intent was not predicated on a finding that Guidant terminated Boyd "because of" age. Rather, the jury was instructed

BEST AVAILABLE COPY

that "If you answered 'yes' to Question No. 1, proceed to answer Question No. 2." *Petition Apdx.* at 22.

Question No. 1 did not ask for or encompass a finding by the jury that Guidant terminated Boyd because of his age. Question No. 1 asked simply, "Do you find . . . that [Boyd's] age was a motivating factor in [Guidant's] decision to terminate [Boyd's] employment?" *Petition Apdx.* at 22. Thus, the jury was not required to find that Guidant terminated Boyd's employment "because of" age before answering Question No. 2. Instead, the jury was required to answer Question No. 2 based on a lesser finding that age was merely a "motivating factor." *See Petition Apdx.* at 22-23 (setting forth Questions Nos. 1 and 2).

If the list of questions required the jury to consider willful intent based only on a predicate "motivating factor" finding, why would the instruction anticipate a higher-level, predicate "because of" finding? This disparity occurred because, as Guidant objected at trial, the "willful" question should have followed Question No. 3. (*See* 5RR:161.) Question No. 3 presented the "because of" or "but for" issue, albeit with the burden shifted to Guidant. *See* Section A, *supra*. Question No. 2 – which did not concern liability, but rather the heightened intent required in order to obtain liquidated damages – should have been asked after both Question No. 1 (whether Boyd established that age was a motivating factor) *and* Question No. 3 (whether Guidant negated age as the "but for" cause). However, the district court ordered the questions such that the jury was required to answer whether Guidant willfully considered age in making its adverse decision before determining

whether Guidant had negated age as the "but for" cause. *See Petition Apdx.* at 22-23.

When the jury was presented with the "because of" or "but for" issue in Question No. 3, the jury found in favor of Guidant. *See Petition Apdx.* at 23; Section A, *supra*. This finding made the issue of intent – *i.e.*, in considering Boyd's age, did Guidant act willfully? – immaterial. *See Rountree v. Smith*, 108 U.S. 269, 274-75, 2 S.Ct. 630, 631, 27 L.Ed. 722 (1883); *Ross v. Up-Right, Inc.*, 402 F.2d 943, 949 (5th Cir. 1968). As the Fifth Circuit properly determined, the jury's findings in Questions No. 1 and 2, that Guidant willfully considered age in deciding to terminate Boyd's employment, are not sufficient under *Gross* to support Boyd's ADEA claim. *Compare Gross*, 129 S.Ct. at 2350; *with Boyd*, 2009 WL 2573407, at *1. Even though the jury believed that Guidant willfully considered Boyd's age, the jury also found that Guidant would have reached the same decision even without *any* consideration of Boyd's age. This answer - not the answer to Question No. 1 about motivating factor or to Question No. 2 about intent – is case determinative. *See Gross*, 129 S.Ct. at 2350.

1. The Fifth Circuit's opinion does not conflict with *Gross*, *Hazen Paper*, or *Reeves*

By affirming the judgment based on the jury's finding that Guidant would have made the same decision regardless of age, the Fifth Circuit's opinion comports with *Gross* and *Hazen Paper*. Both of those cases hold that a plaintiff cannot prevail on a "mixed-motives" ADEA claim where age was not the "but for" cause of, *i.e.*, "determinative influence" on, the employer's

decision. *Gross*, 129 S.Ct. at 2350; *Hazen Paper*, 507 U.S. 604, 610, 113 S.Ct. 1701.

Boyd also asserts that his proof would have been sufficient to establish an ADEA claim under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). It is unclear how *Reeves* applies since it is a "pretext" case rather than a "mixed-motives" case. *See* Section C, *infra*. Nevertheless, it is clear that the Fifth Circuit's opinion does not conflict with *Reeves*.

In *Reeves*, the central issue was whether there was sufficient evidence to support the jury's finding that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves*, 530 U.S. at 138-39 (describing jury's finding and sufficiency challenge), 143 (describing ultimate pretext question). In other words, the question in *Reeves* was whether the evidence was sufficient to support the jury's finding that the employer fired the plaintiff because of age alone. *See id.* In this case, the jury specifically found that Guidant would have fired Boyd regardless of age. The Fifth Circuit's affirmance of the district court's judgment does not conflict with *Reeves*.

2. The ADEA does not authorize Boyd's recovery of attorneys' fees

In one sentence at the end of his first section of argument, Boyd states that the Fifth Circuit's opinion "also improperly disregards the mandatory attorneys' fees requirement" of the ADEA. *Petition* at 16. Although

there are several reasons Boyd is not entitled to recover attorneys' fees, the main reason is that the ADEA's plain language does not authorize them in this case. The ADEA incorporates the attorneys' fees provision of the Fair Labor Standards Act. 29 U.S.C. § 626(b). The FLSA authorizes an attorneys' fees award "in addition to any judgment awarded to the plaintiff . . . ." 29 U.S.C. § 216(b). Because no judgment was awarded to Boyd, the district court properly denied the attorneys' fees request. *See id.*

The inclusion of this issue in Boyd's petition highlights the fact that this proceeding is more about alleged "error correction" than the resolution of important, unsettled issues.

C. This Case Does Not Involve "Pretext" Discrimination

As his second reason for granting the writ, Boyd contends that the "Fifth Circuit has effectively overruled the liability framework established in [*Reeves*] and [*Hazen Paper*] for age discrimination based on evidence of pretext under the ADEA." *Petition* at 17. This argument is founded on the fallacy that this is a "pretext" case. As observed by Justice White over twenty years ago, "The Court has made clear that 'mixed motives' cases, such as the present one, are different from pretext cases . . . ." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (White, J., concurring); *see also id.* at 247 n.12 (majority opinion) (noting that, although a case need not be correctly labeled a "pretext" case or a "mixed-motives" case at the beginning, the district court must decide at some point which type of case it is).

In pretext cases, the true motive for the employer's decision was either the permissible or impermissible consideration, "but not both . . . ." *Price Waterhouse*, 490 U.S. at 260, 109 S.Ct. 1775 (White, J., concurring). "In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Id.*

Neither the district court's judgment nor the Fifth Circuit's opinion has anything to do with a pretext claim under the ADEA. The jury was asked "mixed-motives" questions. *Compare Petition Apdx.* at 22-23 *with* 5TH CIR. PATTERN JURY INSTRUCTIONS – CIVIL 11.11.1. The Fifth Circuit correctly identified Boyd's claim as based on a "mixed-motive theory of ADEA liability." *Boyd*, 2009 WL 2573407, at *1. Indeed, Boyd conceded at trial that his own behavior and performance were "in part" the reason he was fired. (3RR:112.) In reviewing the district court's judgment on Boyd's "mixed-motives" claim, the Fifth Circuit correctly applied the "mixed-motives" standard in *Gross*, rather than the pretext standard used in *Reeves*. *See id.* Thus, Boyd's second "reason for granting the writ" fails.[1]

[1] In the second section of his argument, Boyd recites evidence of a "stray remark" by Owens (Boyd's supervisor's supervisor), which the district court excluded at trial. *Petition* at 18-19. This discussion is improper given that Boyd does not challenge the district court's evidentiary ruling in either of his "Reasons for Granting the Writ." *Id.* at 11. However, in terms of deciding whether to grant Boyd's petition, neither the stray remark nor its exclusion impacts the analysis of the "Reasons for Granting the Writ."

Furthermore, despite their differences, both types of discrimination claims require that the adverse employment decision was made "because of" the impermissible consideration. *See* 29 U.S.C. § 623(a)(1); *Gross*, 129 S.Ct. at 2350 (discussing causation required for plaintiff to prevail on "mixed-motives" claim); *Reeves*, 530 U.S. at 143 (discussing causation required to plaintiff to prevail on pretext claim); *see also Price Waterhouse*, 490 U.S. at 260 (White, J., concurring). Thus, the jury's finding that Guidant negated "but for" causation would be equally fatal to a pretext claim, if Boyd had pursued one.

Boyd's final salvo is that the Fifth Circuit ignored a Title VII standard for reviewing pretext claims when a jury has determined the liability issues in favor of the plaintiff, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *Petition* at 20-21. This argument fails because: (1) the Court has rejected the application of Title VII liability standards to ADEA claims (*see Gross*, 129 S.Ct. at 2349); (2) this case does not involve a pretext claim; and (3) the jury found in favor of Guidant on liability, by determining that Guidant negated the "but for" element.

Boyd's convoluted claims about the Fifth Circuit opinion deflate when compared to the actual opinion and the governing case law. Boyd had the opportunity to convince a jury that his employment was terminated "because of" his age, and he received the benefit of a lower standard than should have been demanded of him. The jury found that Guidant would have made the same employment decision even without considering Boyd's age. Under the standard later enunciated in *Gross*, this

finding precludes Boyd from prevailing on his "mixed-motives" ADEA claim. The Fifth Circuit correctly concluded that the district court's judgment comports with the standard this Court has set. There is no basis for review.

CONCLUSION

Respondent Guidant Sales Corporation prays that the Court deny the Petition for Writ of Certiorari and the relief requested therein.

Respectfully submitted,

KIRSTEN M. CASTAÑEDA
Counsel of Record
EDWARD L. FRIEDMAN
KELLY J. THURMAN
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000

Attorneys for Respondent